

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JEREMY WICKE,

Plaintiff,

Case No. 12-cv-638

v.

L & C INSULATION, INC.

Defendant.

DECLARATION OF JIM CHIOLINO

Jim Chiolino, being duly sworn and under oath, states as follows:

1. I am employed by the State of Wisconsin as Director of the State of Wisconsin, Department of Workforce Development, Equal Rights Division, Labor Standards Bureau ("Bureau"). I have been employed in such position since on or around November 2010.
2. As Bureau Director, my job duties include serving as the Bureau's custodian of records.
3. The Bureau is responsible for interpreting and enforcing Wisconsin's wage and hour laws. Those laws include the overtime provisions under Wis. Admin. § DWD 272 and 274.
4. The Bureau employs wage and hour investigators to investigate employee wage and hour complaints alleging wage and hour violations, including but not limited to alleged violations of the overtime provisions under Wis. Admin. § DWD 272 and 274.
5. The document attached hereto as Exhibit A is a true and correct copy of a Bureau business record kept in the ordinary course of the Bureau's business entitled, "COMPUTING OVERTIME WHEN AN EMPLOYEE HAS WORKED IN EXCESS OF 40 HOURS IN A

WORK WEEK, HAS BEEN PAID AT TWO OR MORE HOURLY BASIC RATES OF PAY AND HAS PERFORMED WORK ON A PUBLIC WORKS PROJECT”.

6. Exhibit A was developed by the Bureau as a regular practice of the Bureau’s activity to describe how overtime is calculated under Wisconsin law.

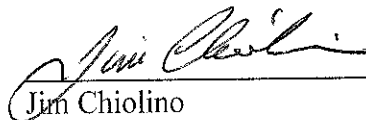
7. Exhibit A reflects the appropriate method for calculating overtime under Wis. Admin. § DWD 272 and 274 when a non-exempt employee has worked in excess of 40 hours in a work week, has been paid at two (2) or more hourly basic rates of pay, and has performed work on a public works project.

8. The Bureau uses Exhibit A to instruct its wage and hour investigators how to calculate overtime when investigating alleged violations of Wis. Admin. § DWD 272 and 274. It has been used as such a resource at all times during the period of time that I have been Bureau Director and prior thereto.

9. Although the Bureau does not publish Exhibit A, it will share Exhibit A with employers, employees, and others when questions arise concerning the proper method for calculating overtime under Wisconsin law.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 26th day of March, 2014.



Jim Chiolino

**COMPUTING OVERTIME WHEN AN EMPLOYEE
HAS WORKED IN EXCESS OF 40 HOURS IN A WORK WEEK,
HAS BEEN PAID AT TWO OR MORE HOURLY BASIC RATES OF
PAY AND HAS PERFORMED WORK ON A PUBLIC WORKS PROJECT**

The first question to ask: What is the established work week, i.e., Sunday through Saturday, Wednesday through Tuesday, etc?

The second question to ask: Did any employee work more than 10 hours per day or 40 hours per week on a public works project?

The third question to ask: Did any employee work more than 40 hours per week on all projects worked during the work week, i.e. on both public and private work?

The fourth question to ask: What is the current overtime policy used by the employer?

IF the employer has an established overtime policy to pay overtime at the rate that is in effect at the time the employee is performing the overtime, then that policy should be used to determine the overtime due an employee that works on both public and private projects during a work week or who works on more than one public project during a work week (at more than one hourly rate of pay) or who works on one public works project but at two different wage rates.

Absent a current established overtime policy, the "weighted average" method must be used.

Use this information to compute the wages due for the sample week shown below.

	HOURLY BASIC RATE PAID	FRINGE BENEFITS PAID	HOW ARE FRINGE BENEFITS PAID?	TOTAL WAGE PACKAGE
Private Project	\$10.00	\$2.20	Paid Up to 40 Hours **	\$12.20
Required Overtime	\$15.00			\$15.00
Public Project	\$18.00	\$3.40	Paid on All Hours Worked	\$21.40
Required Overtime	\$27.00	\$3.40	Paid on All Hours Worked	\$30.40

** As an example: If the employer pays \$173 per month for health insurance for a particular employee, you divide \$173 by 173 working hours per month which gives you a cash equivalent of \$1.00 per hour. The 173 hours are the average *straight time* hours worked per month. Therefore, you cannot take credit for the fringe benefit for hours worked over 40 per week.

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Project	Hours Worked					Totals
	Mon	Tues	Wed	Thurs	Fri	
Private	0	0	0	12	9	21
Public	12	8	11	0	0	31
						52

Weighted Average Method: 1/

Project	Hours Worked	Hourly Basic Rate of Pay	Total Straight Time Wages
Private	21	\$10.00	\$210.00
Public	31	\$18.00	\$558.00
Totals:	52		\$768.00

These three questions should be answered first:

1. Is Any Daily Overtime Due For Work on the Public Project?	Yes 3 Hrs	<u>2/</u> \$9.00/Hour	\$27.00
2. Is any Weekly Overtime Due For Work over 40 hours on the Public Project?	No		None
3. Is Any Overtime Due for Work Performed Over 40 Hours in the week?	Yes 12 Hrs	<u>3/</u> \$7.39/Hour	\$88.68

Actual Overtime Due For the Week: (The employee must be paid the highest amount of the three overtime examples shown above:)	\$88.68 plus Required Fringe Benefits
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Total Wages Due Using Weighted Average Method	
Gross Straight Time Wages Due	\$768.00
Additional Overtime Wages Due	\$ 88.68
Required Fringe Benefits on Public Project	\$ 37.20 <u>4/</u>
Total Due On Check	\$893.88

1/ The "weighted average method" can only be used *when the employee works in excess of 40 hours in any given work week* and has been paid at two or more rates of pay during that work week.

2/ The "premium rate" of \$9.00 is obtained by dividing the straight time hourly basic rate of pay (\$18.00) by 2. However, if the employee is normally paid an hourly basic rate of pay that is higher than the amount listed on the prevailing wage rate determination, the employee's overtime rate would have to be calculated using the higher rate of pay.

3/ The "average hourly rate of pay" is obtained by dividing the total straight time gross wages of \$768.00 by the total hours worked in the week (\$768 divided by 52 hours equals \$14.77). The "premium rate" of \$7.385 (or \$7.39) is obtained by dividing the "average hourly rate of pay" (\$14.77) by two (2).

4/ Note that on pages 1 and 3 the employee is required to be paid \$3.40 per hour in fringe benefits for all hours worked on the public works project in addition to the \$18.00 per hour. Assuming that the employer normally pays \$2.20 per hour to a bona fide fringe benefit fund for at least 40 hours that the employee worked during the week, the employee would still be due \$1.20 per hour for the 31 hours that he/she worked on the public project (\$3.40 - \$2.20 = \$1.20 x 31 Hours = \$37.20).

If the employer's overtime policy has been established whereby it pays employees at the rate that was in effect at the time the overtime was performed, it would pay the employee in the following manner (The wage and hour information is the same that was used for the weighted average example):

	HOURLY BASIC RATE PAID	FRINGE BENEFITS PAID	HOW ARE FRINGE BENEFITS PAID?	TOTAL WAGE PACKAGE
Private Project	\$10.00	\$2.20	Paid Up to 40 Hours	\$12.20
Required Overtime	\$15.00			\$15.00
Public Project	\$18.00	\$3.40	Paid on All Hours Worked	\$21.40
Required Overtime	\$27.00	\$3.40	Paid on All Hours Worked	\$30.40

		Hours Worked					
Project		Mon	Tues	Wed	Thurs	Fri	Totals
Private	ST	0	0	0	12**	0	12
	OT	0	0	0	0	9	9
Public	ST	10	8	10	0	0	28
	OT	2	0	1	0	0	3

** On this day, after the employee had worked nine (9) hours on Thursday, he would have worked a total of 40 hours and normally would have been required to be paid for all the remaining hours in the week at an overtime rate. However, he had already been required to be paid three (3) hours of overtime at the public wage rate (anything over 10 hours per day) on Monday and Wednesday, so now all hours that he worked after 43 hours would be overtime at the private rate.

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Hours Worked On Both Projects	Hourly Basic Rate <i>Plus</i> Fringe Benefits Due, if Applicable	Totals
28 = <i>Straight Time Public</i> Project Hours	\$21.40	\$599.20
12 = <i>Straight Time Private</i> Project Hours	\$10.00	\$120.00
3 = <i>Daily Overtime Public</i> Project Hours	\$30.40	\$ 91.20
9 = <i>Overtime Private</i> Project Hours in Excess of 40	\$15.00	\$135.00
		\$945.40
		Minus \$68.20 (fringe benefits of \$2.20 per hour paid by employer for the 31 public project hours)
Total Due on Check:		\$877.20

**Computing Overtime When An Employee is Paid a Salary
and Works on Both Public and Private Projects in One Work Week**

Weighted Average Method: 1/

<u>Project</u>	<u>Hours Worked</u>	<u>Hourly Basic Rate of Pay</u>	<u>Total Straight Time Wages</u>
Private	60	\$9.60	\$576.00
Public	15.5	\$17.12	\$265.36
Totals:	75.5		\$841.36

These three questions
should be answered first:

1. Is Any Daily Overtime Due For Work on the Public Project?	Yes 1 Hr	<u>2/</u> \$8.56/Hour	\$8.56
2. Is any Weekly Overtime Due For Work on the Public Project?	No		None
3. Is Any Overtime Due Per Wis. Adm. Code Ch. Ind 74?	Yes 35.5 Hrs	<u>3/</u> \$5.57 /Hour	\$197.74

Actual Overtime Due For the Week: (The employee must be paid the highest amount of the three overtime examples shown above.)	\$197.74 plus Required Fringe Benefits
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<u>Total Wages Due Using Weighted Average Method</u>	
Gross Straight Time Wages Due	\$ 841.36
Additional Overtime Wages Due	\$ 197.74
Required Fringe Benefits on Public Project	\$ 21.70 <u>4/</u>
Total Due on Check	\$1060.80
Amount Actually Paid for the Week	\$ 725.00
Amount Due in Back Pay	\$ 335.80

1/ The "weighted average method" can only be used *when the employee works in excess of 40 hours in any given work week* and has been paid at two or more rates of pay during that work week.

2/ The "premium rate" of \$8.56 is obtained by dividing the straight time hourly basic rate of pay (\$17.12) by 2. However, if the employee is normally paid an hourly basic rate of pay that is higher than the amount listed on the prevailing wage rate determination, the employee's overtime rate would have to be calculated using the higher rate of pay.

3/ The "average hourly rate of pay" is obtained by dividing the total straight time gross wages of \$841.36 by the total hours worked in the week (\$841.36 divided by 75.5 hours equals \$11.14). The "premium rate" of \$5.57 is obtained by dividing the "average hourly rate of pay" (\$11.14) by two (2).

4/ Assuming that the employer normally pays \$2.90 per hour to a bona fide fringe benefit fund(s) for all hours the employee worked during the week, the employee would still be due \$1.40 per hour for the 15.5 hours that he/she worked on the public project (\$4.30 - \$2.90 = \$1.40 x 15.5 Hours = \$21.70).

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If the employer's overtime policy has been established whereby it pays employees at the rate that was in effect at the time the overtime was performed, it would pay the employee in the following manner (*The wage and hour information is the same that was used for the weighted average example*):

"Rate in Effect at the Time the Employee Worked the Overtime" Method

	HOURLY BASIC RATE PAID	FRINGE BENEFITS PAID	HOW ARE FRINGE BENEFITS PAID?	TOTAL WAGE PACKAGE
Amount Actually Paid for the Entire Week	\$725.00/Wk ($\725 divided by 75.5 hours equals \$9.60 per hour)	\$2.90	Paid on All Hours Worked	\$12.50 (Average Rate Plus Fringe Benefits)
Required S.T. on the Public Project	\$17.12	\$4.30	Paid on All Hours Worked	\$21.42
Required O.T. on the Public Project	\$25.68	\$4.30	Paid on All Hours Worked	\$29.98

		Hours Worked						Totals
Project		Mon	Tues	Wed	Thurs	Fri	Sat	
Private	S.T.	11	8	8	0	0	0	27
	O.T.	0	0	0	12.5	11.5	9	33
Public	S.T.	0	6.5	6.5**	0	0	0	13
	O.T.	0	0	2.5	0	0	0	2.5

** At this point, the employee had already worked 40 hours so everything after that point was overtime..

Hours Worked On Both Projects	Hourly Basic Rate Plus Fringe Benefits Due, if Applicable	Totals
13 = Straight Time Public Project Hours	\$21.42	\$278.46
27 = Straight Time Private Project Hours	\$ 9.60	\$259.20
2.5 = Daily Overtime Public Project Hours	\$29.98	\$ 74.95
33 = Overtime Private Project Hours in Excess of 40	\$14.40	\$ 475.20
		\$1087.81
		Minus \$44.95 (fringe benefits of \$2.90 per hour paid by employer for the 15.5 public project hours)

Total Due on Check	\$1042.86
Amount Actually Paid for the Week	\$ 725.00
Total Due in Back Pay Using "Rate in Effect" Method	\$ 317.86